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CENTRAL COURTS OF LAW AND REPRESENTATIVE ASSEMBLIES IN THE SIXTEENTH CENTURY.

The sixteenth century saw the end of the legal and political ideas of the Middle Ages, and the beginnings of the legal and political ideas of the modern world. Throughout Western Europe the legal and political institutions of the mediæval state were adapted to the needs of the modern state; and the manner in which that adaptation was made in each particular country affected the whole subsequent history of that country. The legal and political ideas and institutions of the Middle Ages were founded ultimately upon a belief in the existence of absolute rights guarded by a supreme law. In the sixteenth century they were replaced, in most of the countries of Western Europe, by a new set of legal and political ideas and institutions founded upon a belief in the sovereignty of the ruler of the state. And thus, as Stubbs has pointed out,[1] while mediæval history is, in the main, a history of rights and wrongs, the history of the sixteenth, seventeenth, and eighteenth centuries is, in the main, a history of forces, powers, and dynasties. In England these new ideas and institutions made their appearance. The power of the crown, and therefore of the executive government, was so strengthened that England became a territorial state of the modern type, and English law public and private was made equal to the task of keeping the peace, and of settling the relations between man and man in this new age of Renaissance and Reformation. But the manner in which this change was effected in England was very different from the manner in which it had been effected abroad. It was effected, not, as abroad, by wholly, or almost wholly, replacing mediæval institu-

[1]Lectures on Mediæval and Modern History 239.

tions by new institutions, but by so improving the efficiency of existing mediæval institutions that these mediæval institutions were able to meet the new demands made upon them by the modern state. Parliament was controlled by the executive; but it remained the taxing and legislative body in the state. The Justices of the Peace were made the centre of a new system of local government. The ordinary courts of common law retained many of their quasi-political functions. The retention of these mediæval institutions meant the retention of some of the legal and political ideas which underlay them; and thus at the end of the sixteenth century the English constitution and English public law differed fundamentally from the constitution and the public law of the principal states of Western Europe. In England, and in England alone, there had been a continuity of development. That this continuity was possible was due to the fact that the English constitution and English law of the fourteenth and fifteenth centuries were not purely mediæval; for, in the twelfth and thirteenth centuries, England had evolved a centralized government under modified mediæval forms, and a common law which retained mediæval ideas modified, in like manner, to suit the needs of a centralized government. In this century it was the maintenance of this continuity which, more than any other single cause, enabled a successful resistance to be made in England, and in England alone, to the establishment of an absolute monarchy.

It would be difficult, therefore, to exaggerate the importance of the sixteenth century in English constitutional history; and yet that history has never been adequately written. We are beginning to know something of the real meaning of mediæval ideas and institutions. We already know much of those constitutional controversies of the seventeenth century, out of which the English constitution of the eighteenth and nineteenth centuries emerged. But, if we except Mr. Protheroe's introductory sketch to his Select Documents, we are obliged to look for the constitutional history of the sixteenth century to writers of the type of Hallam, who judge that history exclusively from the point of view of the later part of the seventeenth and of the eighteenth centuries. And yet it is clear that if we are to form a just judgment as to the rights and wrongs of the constitutional controversies of the seventeenth century, we should know something of the political ideas amidst which the chief actors in those controversies had been brought up. To adopt exclusively the standpoint of our modern settled

constitutional law, and to content ourselves with taking the Parliament's view of the connection between precedents drawn from the Parliamentary history of the Middle Ages and the new law established as the result of the controversies of the seventeenth century, is to do more than justice to the cause of the Parliament, and less than justice to the cause of the King. Such an attitude prevents us from giving due weight to the manner in which mediæval ideas and institutions had been modified by the new ideas and institutions that had come with the sixteenth century.

One recent writer has attempted to tell us something of the constitutional history of the sixteenth century from another point of view. Professor McIlwain's able essay upon "The High Court of Parliament"[2] is a corrective to writers of the type of Hallam, because it looks at parliamentary history from the point of view, not of the late seventeenth and eighteenth centuries, but of the Middle Ages. His conclusions as summarized by himself in the preface to his essay are as follows:

"(*a*) England after the Norman Conquest was a feudal state, *i. e.*, its political character is better expressed by the word feudal than by the word national. (*b*) As a consequence, her central assembly was a feudal assembly, with the general characteristics of feudal assemblies. (*c*) One of those characteristics was the absence of law-*making*. The law was declared rather than made. (*d*) The law which existed and was thus declared was a body of custom which in time grew to be looked upon as a law fundamental. Rules inconsistent with this fundamental law were void. Such a law was recognized in England down to modern times. (*e*) Another characteristic of the times was the absence of a division of labour between different 'departments' of government and the lack of any clear corresponding distinctions in governmental activity, as 'legislative,' 'judicial,' or 'administrative.' (*f*) Parliament, the highest 'court' of the Realm, in common with the lower courts, participated in these general functions of government. It both 'legislated' and 'adjudicated,' but until modern times no clear distinction was perceived between these two kinds of activity, and the former being for long relatively the less important, we may say roughly that Parliament was more a court than a legislature, while the ordinary courts had functions now properly called legislative as well as judicial. (*g*) 'Acts' of Parliament were thus analogous to judgments in the inferior courts and such acts were naturally not treated by the judges in these courts as inviolable rules *made* by an external omnipotent legis-

[2]The High Court of Parliament and its Supremacy, an historical essay on the boundaries between legislation and adjudication in England.

lative assembly, but rather as judgments of another court, which might be, and were at times, treated as no modern statute would ever be treated by the courts to-day."

Our general criticism upon Professor McIlwain's book, formed after carefully reading it with great profit to ourselves, is that it suffers from the opposite defect to Hallam's work in that the story is told too exclusively from the mediæval point of view. The English constitution and the English common law of the fourteenth and fifteenth centuries were, as we have said, not purely mediæval. Many of Professor McIlwain's conclusions would be far more applicable to the French Estates General and to the French Parlements than to the English Parliaments and the English courts of law, because, as we shall see, these French institutions retained many more purely mediæval traits than the parallel English institutions. If the English Parliament and the English courts of law had been as mediæval in character as he maintains they were, we doubt whether they could have been adapted, as the Tudor kings adapted them, to the needs of the modern state.

The great merit of Professor McIlwain's book consists in the fact that it has brought into prominence a neglected aspect of many facts in English history from the twelfth to the seventeenth centuries. But it has the defects of its qualities, in that it gives too much prominence to that which was formerly too much neglected. But our own conclusions and the points wherein we differ from Professor McIlwain will appear at large in the following pages, and we must leave our readers to judge between us.

In some centuries the legal and constitutional history of England runs very much upon its own lines. The history of the fourteenth and fifteenth, and the history of the seventeenth centuries can be told without very much reference to contemporary continental events. In other centuries we must bear in mind these contemporary continental events if we are to understand the real significance of the English facts. The age of Bracton can hardly be understood without some reference to the events which made the twelfth and thirteenth centuries an age of legal Renaissance throughout Western Europe. Still less can we understand the significance of the legal and constitutional history of England in this century of Renaissance, Reformation and Reception, without some reference to parallel developments abroad. We shall, therefore, in the first place say something of the history of the Central

Courts of Law and Representative Assemblies abroad, in order that we may the better understand the unique position to which the English Parliament and the English courts of common law attained during this century.

The Continental Development.

In many of the countries of Western Europe representative assemblies were to be found in the thirteenth and fourteenth centuries. The Cortes of Castile and Aragon, and the Estates General of France were not unlike the English Parliaments of these centuries. The Cortes of Castile and Aragon controlled taxation and legislation, and sometimes seem to have exercised supervision over all the business of the state.[3] The powers of the Estates General were somewhat more limited. Ordinarily they seem only to have had the right to control taxation, and the right to give counsel to the king.[4] But, with the one exception of the English Parliament, these representative assemblies failed to stem the tide of absolutism in the sixteenth century, and survived, if they survived at all, merely as the shadows of their former selves. The Castilian Cortes, after the revolt of the *communeros* (1520-21) became completely subservient to the king, who bribed or nominated its members.[5] After 1591 the Cortes of Aragon were similarly muzzled.[6] The Estates General lost their powers earlier. The stress of the hundred years' war induced them to vote permanent taxes to keep on foot a paid army (1435 and 1439); and they tried in vain to regain their lost control over taxation.[7] By the second half of the sixteenth century their consent or their refusal to consent to a new tax was a matter of no importance. They never acquired a power to legislate. They could advise, complain, or petition; but that was all.[8]

[3]Hallam, Middle Ages ii 24-33, 55, 56.

[4]Esmein, Histoire du droit Francais 506 *seqq.*: Brissaud, Histoire du droit Francais 805, 806. Sometimes they exercised extraordinary powers *e. g.* in 1355-57 they controlled the administration, and in 1420 they ratified the treaty of Troyes; they also claimed certain rights of election to the throne in case of a vacancy, certain rights during the minority of the King, and certain rights of sanctioning alienation of the royal domain, Esmein, *op cit.* 503-505; but these claims are shadowy—on such matters they did little more than deliberate; their ordinary rights are those stated in the text.

[5]Ranke, Turkish and Spanish Monarchies (Kelly's Tr.) 56-58; in 1534 it was said that a place in the Cortes was worth 14,000 ducats; after 1538 the nobles were never summoned.

[6]*Ibid.* 64, 65.

[7]Esmein, *op. cit.* 507-510.

[8]*Ibid.* 511, 512.

The right to petition did not, as in England, develop into a right to consent, to refuse to consent, or to propose new laws.[9] The king was free to act or not as he pleased upon their petitions.[10] These petitions, it is true, often supplied valuable material for the making of laws; but, as in England in the fourteenth century, it was the king who made the laws.[11] Even though their powers were thus diminished, they were distrusted. Their existence gave countenance to democratic claims, which assorted ill with the position which the monarchy had assumed.[12] After 1614 none were assembled till the eve of the Revolution.

The reasons why these representative assemblies failed to become a permanent check upon the king, and a permanent part of the constitution were mainly two. In the first place their constitution and procedure were defective. In the second place they excited the hostility of the lawyers, because the position which the lawyers claimed for the law courts seemed to be threatened by the claims of these assemblies.

(1) The constitution of these assemblies was defective. The nobility and the *tiers état* sat separately. Either the nobility were not summoned; or, if they were summoned, they failed to attend, as in Castile;[13] or, if they attended, they failed to act with the *tiers état*, because their interests were too divergent. Thus in France the exemption of the nobility from the *taille* caused them to take little interest in the struggle to gain control over taxation.[14] The procedure of these assemblies was even more defective. Their activities were seriously limited by old rules which were survivals

[9]Holdsworth, History of English Law ii 363-366.

[10]"Le roi était libre absolument de repousser les demandes ou d'y accéder; c'était une supplique qui lui était addressée," Esmein, *op. cit.* 512; under Philip II the position of the Cortes in relation to the King was very similar, Ranke, *op. cit.* 59, 60.

[11]Hence, as in the English Parliament, we get complaints that, "Le pouvoir royal dénaturait les articles des cahiers;" cp. Holdsworth, *op. cit.* ii 365.

[12]Hotman, Franco-Gallia (Ed. 1573) c. c. XV-XVIII argues from the history of the Estates General, as English statesmen argued from the history of the English Parliament, that the French monarchy was not absolute—"Utcumque sit, perspicuum est, nondum centisimum annum abiisse ex quo Francogalliæ libertas, solemnisque concilii auctoritas vigebat, et vigebat versus regem [Louis XI] * * * tanta imperii magnitudine praeditum, quantam nunquam in ullo rege nostro fuisse constat;" cp. H. Lureau, Les doctrines democratiques de la seconde moitié du XVI[e] siècle 5-10, for instances of claims to the exercise of various powers made by or for the Estates General in the fifteenth and sixteenth centuries.

[13]Ranke, *op. cit.* 56, 57.

[14]Esmein, *op. cit.* 554; in Spain there was a long standing feud between the towns and the nobles, Ranke, *op. cit.* 56.

of a very primitive stage in the history of law. Thus in Aragon, till 1591, the principle that a decision could be arrived at by a majority vote was unknown. A single dissentient could prevent the levy of a tax or the passing of a law.[15] Both in France and in Castile it would seem that, without express powers from their constituents, the deputies could do nothing except present grievances.[16] These rules represented archaic legal ideas which were being rapidly driven from the legal systems of the principal states of Europe by the victorious advance of Roman law.

(2) The preservation of these archaisms partially explains the hostility of the lawyers. The order of legal ideas with which the lawyers of this age of the Reception were familiar was very different from the order of legal ideas which these assemblies represented. But the cause for this hostility really went deeper than this. In many countries, and notably in France, the claim of the central courts to exercise political functions, made them the rivals of these assemblies.[17] As Mr. Armstrong says:

"The jealousy between judicature and legislature has been a prominent rock of offence in the pathway of French constitutional liberty."[18]

But in order to understand this cause for the jealousy of the lawyers we must explain the constitutional position which they claimed for some of these central courts.

[15]Ranke, *op. cit.* 65; it was enacted in 1591 that for the future, "the majority of every estate constitutes the estate; even if a whole estate be wanting this shall have no influence upon the constitution of the Cortes, provided that the same shall have been duly summoned according to law;" and see generally as to the Cortes of the Spanish Kingdom in the later Middle Ages, R. B. Merriman, 16 Am. Hist. Rev. 476-495; for some account of the history of the majority principle see Redlich, The Procedure of the House of Commons ii 261-264; cp. *infra* n. 61.

[16]Esmein, *op. cit.* 498, "Les députés aux Etats généraux étaient, quant à leurs pouvoirs, soumis au régime qu'on appelle le *mandat impératif* * * * Plus d'une fois les députés répondirent aux demandes royales que celles—ci excédaient leurs pouvoirs, et il fallut les renvoyer devant leurs electeurs pour en recevoir de nouveaux;" for a similar rule in Castile see Ranke, *op. cit.* 58—Charles V got over it by dictating a comprehensive form of credentials which must be given to all deputies; for similar and greater defects in the German diet see Camb. Mod. Hist. i 290, 291.

[17]Esmein, *op. cit.* 508, 509, tells us that in 1485 the Parlement of Paris turned a deaf ear to the request of the duke of Orleans that it would assent to the principle that the taxes should not be increased without the consent of the Estates—"C'est qu'il s'agissait des Etats généraux, c'est à dire d'un pouvoir politique en partie rivale, dont les parlements contrarièrent incontestablement le développement et auquel ils cherchèrent à se substituer;" cp. Armstrong, French Wars of Religion 15, 24, 25 for the events of 1566.

[18]*Op. cit.* 15.

Our own constitutional history teaches us that courts of law were, in the days before the functions of government had become specialized, very much more than merely judicial tribunals. In England and elsewhere they were regarded as possessing functions which we may call political, to distinguish them from those purely judicial functions which nowadays are their exclusive functions on the continent, and their principal functions everywhere. That the courts continued to exercise these larger functions, even after departments of government had begun to be differentiated, was due to the continuance of that belief in the supremacy of the law which was the dominant characteristic of the political theory of the Middle Ages.[19] The law was a rule of conduct which all members of the state, rulers and subjects alike, were bound to obey. The whole conduct of government consisted in the enforcement of the law, and in the maintenance of the rights and duties to which it gave rise. It was a necessary consequence of this theory of government that the court should possess political functions; for they existed not merely to do justice as between private persons, but also to see that the law itself was not arbitrarily infringed or altered by the king or any other person.

The two most striking illustrations of the political powers possessed by these mediæval courts are the Justiza of Aragon, and the Parlement of Paris. Both possessed large powers which were designed to safeguard the supremacy of the law, and to preserve to the individual the rights which it gave him.

The Justiza held his office for life, and was responsible only to the Cortes. He could prohibit any inferior court from proceeding with a case. He was the final judge on points of law arising in all other courts. By the process of *Juris-firma* he could bring any case pending in the lower courts before himself: by the process of *Manifestation* he could bring before himself any person imprisoned, that he might adjudicate upon the justice of the charge made against him. He administered the coronation oath to the king; and often represented him in the Cortes. These powers were evidently designed to protect the subject against

[19] *Supra* 1; cp. Holdsworth, *op. cit.* ii 154, 197-200, 361, 362; Esmein, speaking of the Parlement of Paris (*op. cit.* 379) says, "Quoique le parlement rendit ses sentences au nom du roi, source de toute justice, dans les arrêts qu'il prononçait, c'était la cour qu'on faisait parler (*la cour ordonne, condamne*) tandis que, dans les arrêts du conseil du roi, le roi parlait toujours en personne (*par le roi en son conseil*)."—this very neatly expresses the contrast between the ideas which underlay the jurisdiction of the older courts, and the ideas which underlay the jurisdiction of the newer courts of the sixteenth century.

any infringements of the law.[20] They existed till the revolt of Saragossa in 1591. After that date the Justiza and his deputies became practically nominees of the king.[21] The new idea that the king's will was law triumphed over the mediæval idea and the mediæval institution invented to safeguard it.

The Parlement of Paris is a more famous illustration of the same idea. By the end of the thirteenth century it had become a regular court of justice split up into several divisions—the Grand-chambre, the Chambre des Enquêtes, the Chambre des Requêtes, and the Chambre de la Tournelle.[22] But besides this it regarded itself as the guardian of the fundamental laws of the country;[23] and because it possessed these functions it was praised by Machiavelli as one of the wisest institutions in the country.[24] In the sixteenth and seventeenth centuries the reason for their existence was the subject of many conflicting theories.[25] In truth it cannot be understood unless we remember the mediæval ideas as to nature of law, and as to the relation of the law to the court which administered it.

The methods in which it exercised this power were various. In the fourteenth and fifteenth centuries it was sometimes consulted by the king along with the Council.[26] Then and later constitutional questions were sometimes submitted to it.[26] It could take action against offenders against the state.[26] It could make supplementary rules and regulations as to matters which fell within its jurisdiction.[27] But the most important of all these methods was that of remonstrance, and of refusing to register

[20]Hallam, Middle Ages ii 48-55.

[21]Ranke, Turkish and Spanish Monarchies 64, 65; Camb. Mod. Hist. iii 516, 517.

[22]Esmein, *op. cit.* 362-379 for its origins; *ibid.* 379-384 for its organization, and the description of the functions of these different divisions.

[23]"Ils se disaient en particulier les gardiens de *lois* fondamentales ou *principes fondamentaux* de la monarchie. On entendait par là certaines règles de droit public, considérées comme si essentielles que le roi lui-même pleinement investi du pouvoir legislatif, ne pouvait y deroger," *ibid.* 518; this is a very mediæval idea, cp. Holdsworth, *op. cit.* ii 367, 368; certain of these matters, such as the descent of the crown and the inalienability of the royal domain, were enumerated; but, beyond that, they asserted that the principle that the monarchy was not absolute but limited was a fundamental law,—"seulement ici on tombait dans le vague at les parlements avaient beau jeu."

[24]Il Principe, cap. XIX.

[25]For these theories see Brissaud, *op. cit.* 884.

[26]Esmein, *op. cit.* 519, 520.

[27]"Arrêts de règlement," *ibid.* 528-531.

laws submitted to it by the king.[28] It was this last power which for a long time moderated the absolute character of the French monarchy; and it remained at intervals an obstacle to the crown right up to the end of the ancient *régime.*[29]

The manner in which the Parlement was composed would seem at first sight to render it an efficient guardian of the law. In France, as in England,[30] property and office were confused. Its members were a body which were practically irremovable, because they had bought their seats, and because they could hand them on to their nominees.[31] But in reality this was a source of weakness. They were a close oligarchical body.[32] They were often corrupt.[33] It was only occasionally and by accident that they commanded the confidence or sympathy of the public. Another source of weakness was the fact that the king had never ceased to exercise extensive powers over the court. He could not only control the conduct of or the decision in a case,[34] he could also personally intervene. If the king came down in person and held a *"lit de justice,"* he could force the Parlement to act as he pleased,[35] while it was always possible to intimidate or punish its members, and sometimes to disregard it entirely.[36] If he did not exercise these powers and allowed a modification made by the Parlement he could take credit for his moderation; and this tended to make the rights of the Parlement look as if they were dependent merely upon his pleasure.[37] Again in later times, when provincial Parle-

[28]Esmein, *op. cit.* 521-526.

[29]See *ibid.* 531-543; and Brissaud, *op. cit.* 885-887 for an account of the chief occasions on which this right was exercised.

[30]Holdsworth, *op. cit.* i 11 n. 1.

[31]Esmein, *op. cit.* 401-412; as he says at p. 411, "Il assura à la magistrature une pleine independance; et, sans lui, les résistances politiques des parlements aux XVII[e] et XVIII[e] siècles ne se comprendraient pas."

[32]*Ibid.* 408.

[33]*Ibid.* 410-412—they had bought their places and wanted to see their money back, cp. Holdsworth, *op. cit.* i 221, 228, 229, for similar abuses in the Chancery.

[34]Esmein, *op. cit.* 431-439.

[35]Esmein, *op. cit.* 527.

[36]*Ibid.* 528.

[37]Cp. Pasquier, Lettres Bk. XIX No. 15, "Nos Roys, par une bienveuillance naturelle qu'ils portent à leurs subjects, reduisants leur puissance absolue sous la civilité de la Loy, obéissent leur Ordonnance;" Henry IV said to the Parlement of Paris, "J'ai remis les uns d'entre vous en leurs maisons d'où la Ligue les avait chassés et les autres en l'autorité qu'ils n'avaient plus. Si l'obéissance était due à mes predecesseurs, il est dû d'autant plus de devotion à moi qui ay restablis l'Estat," cited H. Lureau, Les doctrines democratiques de la seconde moité du XVI[e] siècle 18, 19.

ments were multiplied, all of them claimed the same rights of refusing to register a law. Thus a law might be in force in some parts of the country and not in others.[38] Thus it happened that, except in times of political excitement, the Parlement was no permanent check on the royal will, for its remonstrances could be disregarded, and its refusal to register a law overridden.

Thus neither the representative assemblies of the Middle Ages nor the powers possessed by the central courts of law were able to stand against the new institutions which made for royal absolutism. The constitution and procedure of the representative assemblies were so defective that they were powerless to act efficiently as organs of government in a modern state. They could hamper the activities of the executive government, and they could hinder the development of the state. But they were powerless to criticize intelligently or to control permanently. The lawyers were naturally on the side of the executive government in its efforts to rule efficiently. They were naturally opposed to ineffective assemblies which often voiced the aspirations of a turbulent feudalism, and attacked the abuses of the law. On the other hand, these assemblies had an advantage, the absence of which was fatal to the aspirations of the lawyers to stem the advancing tide of absolutism. They did in a manner represent the nation. The lawyers, as we have seen, in no sense represented the nation. Though the powers which they claimed might have made their courts efficient barriers against arbitrary government, they were the powers of a caste which was often deservedly[39] unpopular. The destruction of their powers roused no national indignation. The enthusiasm for fundamental constitutional laws, administered by the lawyers in their courts, was naturally confined to the lawyers themselves. Nor can we say that the popular instinct was wholly at fault. Fundamental laws generally represent an old order of legal ideas; and thus administered they are apt, in a changing age, to impede the due development of the state.

"Divide et Impera." The new centralized machinery of government, having divided the forces opposed to it, was able to rule supreme. Having suppressed or muzzled the representative assemblies, and having deprived the courts of their political

[38] Brissaud, *op. cit.* 881.

[39] H. Lureau, Les doctrines democratiques de la seconde moité du XVI^e^ siècle 19, "Peu à peu les parlements perdent leur véritable caractère, se mettent en lutte contre la royauté sans s'attirer les faveurs de l'opinion publique, et deviennent insupportables et impopulaires."

powers, it could exercise supreme authority; and it was able to make that authority felt in every corner of the state, because it was able to supersede the older local officials by delegates responsible only to itself, and subject, not to the ordinary law, but to an administrative law which it itself dispensed. The facts were prepared, and the time was ripe. The first political philosopher who could generalize from them could hardly fail to enunciate a theory of sovereignty.

The English Development.

The English Parliaments of the thirteenth and fourteenth centuries are, like the Spanish Cortes or the French Estates General, assemblies in which the king meets the various Estates of his Realm.[40] Like their foreign contemporaries, they aspire to control taxation and legislation. The English courts of common law and the English lawyers, like their brethren on the continent, believe that king and subject alike are bound to obey the law, and they claim and exercise the power to punish all persons or bodies of persons, save the king, who disobey it.[41] But the constitutional history of the English Parliament, and the constitutional history of the English courts of common law differ entirely from the analogous continental institutions. By the end of the sixteenth century Parliament was recognized as being the "highest and most authentical court of England,"[42] and, under the leadership of Coke, the common lawyers were claiming that the common law administered in their courts was the supreme law, to which even the prerogative of the crown was subject.[43] An examination of the causes for this divergence between the English and the continental development will show us clearly the reasons why, at the close of the sixteenth century, the English state had assumed a form which was unique in Western Europe,[44] and will enable us the bet-

[40]Redlich, Procedure of the House of Commons i 5, 6-9.

[41]Holdsworth, *op. cit.* ii 154, 197-200, 361, 362.

[42]Smith, Republic Bk. II c. 2.

[43]See *e. g.* Co. Third Instit. 84, "The common law hath so admeasured the prerogatives of the king, that they should neither take away nor prejudice the inheritance of any;" cp. Bacon's Argument in Calvin's Case, Co. Works (ed. Spedding) VII 646, "Towards the king the law doth a double office. * * * * The first is to entitle the king or design him. * * * * The second is * * * * to make the ordinary power of the king more definite or regular. * * * * And although the king in his person be *solutus legibus,* yet his acts and grants are limited by law, and we argue them every day."

[44]*Infra* 31.

ter to appreciate the skill with which the Tudor sovereigns maintained an equilibrium amidst the complicated and unstable balance of forces existing in that state.

In the thirteenth century the king's Council was the "core and essence" of the Parliament; and the term "Parliament" means rather a colloquy than a defined body of persons. At this Parliament—this colloquy—important cases were decided, and petitions were received.[45] In the course of the fourteenth century this "colloquy" developes into a body possessed of a unique set of powers and privileges. From the king's Council in Parliament there is developed the House of Lords, and from the representative knights and burgesses who are summoned to meet the king's Council in Parliament there is developed the House of Commons. Thus from the meeting of the Estates at "a" Parliament or colloquy with the king's Council, there has emerged "the" Parliament; and this Parliament has become an essential organ of the English government. "The High Court of Parliament" has taken a separate and important place among those courts which conduct the government of the mediaeval state.[46]

During the fourteenth and fifteenth centuries Parliament acquires a definite body of powers, and a procedure which helps to consolidate its position in the state. Under the Lancastrian kings it has asserted its right to be the taxing and legislative authority; and the change in procedure from legislation by way of petition, to legislation by way of bill emphasized the fact that Parliament was a partner with the king in the work of legislation.[47] Mr. Redlich points out[48] that it was the adoption of this procedure by bill which "completed the parliamentary edifice;" for it was not till this had taken place that Parliament

"stood out as a representation of the kingdom by means of two corporate bodies with equal rights; nor is it till then that a sure foundation was laid for the equal, or in money matters, the preponderant position of the House of Commons in legislation and politics."

The distinct corporate character of the House of Commons was further emphasized by the fact that it acquired the right to conduct its debates apart from the crown, and by the fact that the crown had no right to take cognizance of debates proceeding in

[45]Maitland, Parliament Roll of 1305 (R. S.) XLVII; Holdsworth, *op. cit.* i 171-173.

[46]Redlich, *op. cit.* i c. 2.

[47]Holdsworth, *op. cit.* ii 364-366.

[48]*Op. cit.* i 19, 20; *infra* 26-28.

the House;[49] and the distinct corporate character of the two Houses was emphasized by their possession of numerous privileges, which had been successfully asserted during these centuries, and recognized by the courts in wide and ample terms.[50] It is clear that by the end of the fifteenth century Parliament has acquired a position very different from that held by any ordinary court.

Thus at the close of the mediaeval period the differences between the English Parliament and the representative assemblies of the continent were well marked. There were many reasons for this, some of which have often been noted by historians. The fact that the representatives of the counties and the towns united in one House of Commons added to the weight of the representative House. That this alliance was possible was due in part to the commonness of the common law. In part it was due to the absence of anything like the *noblesse* of the continent; and this again, in an age when property and office and dignity were closely interwoven, was connected with the strict rule of primogeniture which, from an early period,[51] had been the rule laid down by the common law first for the military tenures and then for all the free tenures. The fact that England was free from invasion during a period which was on the whole a period of commercial growth and prosperity, coupled with the fact that the English kings desired to pursue an aggressive and therefore an expensive foreign policy, rendered possible a process of bargaining which necessarily resulted in acquisition and consolidation of the powers of Parliament. We do not overlook the importance of these facts; but we wish to emphasize especially here another, and a more especially legal set of facts, the importance of which was great in the Middle Ages, and even greater in the sixteenth century.

At no period in English history do we see any antagonism between the common lawyers and the Parliament. On the contrary, the lawyers recognize it not only as a court, but as "the highest court which the king has,"[52] in which relief could be given which could be given nowhere else,[53] in which powers could be exercised which neither the king nor any other body in the state

[49] *Ibid.* iii 37, 38.

[50] Holdsworth, *op. cit.* ii 472.

[51] *Ibid.* iii 140.

[52] Y. B. 19 Hy. VI Pasch. pl. 1 p. 63, "Le Parlement est la court du Roy, et le plus haut court que il ad;" Holdsworth, *op. cit.* ii 362 n. 1.

[53] Brooke, Ab. *Parlement* pl. 33, "Ou matter est econter reason, et le partie nad remedy al comon ley il suera pur remedy in parliament."

could exercise,[54] in which the errors of their own courts could be redressed.[55] From an early period lawyers have been distinguished members of the House of Commons;[56] and the judges and the law officers were from the earliest period members of the Council, which was at first the "core and essence" of the Parliament. Even when the judges and law officers ceased to be members of the House of Lords, they continued to be summoned, and are still summoned, to that House by writs of attendance.[57] This is a fact of the greatest importance in the history of the English Parliament because it meant that the best legal talent of the day was ready to assist in the development of its powers. It meant that men who were accustomed to the working of the procedural rules of the royal courts were ready to assist it to devise a rational system of procedure. No doubt the procedural rules of the common law were gravely defective;[58] but they had at least one merit—they discountenanced the very archaic legal ideas which so seriously hampered the representative assemblies of the continent. They were capable of a certain amount of development and adaptation;[59] and the men who spent their lives in working and developing them were the men who were the best fitted to create a workable set of rules for the guidance of a representative assembly. We must not minimize the importance of this question of procedure; for, just as the procedural rules of the common law were the foundation upon which that law was built, so the acquisition by the English Parliament of a reasonable set of procedural rules is the secret of its capacity to develop into an organ of the government of the state.

We know, it is true, but little of the procedure of the mediæval Parliaments. But Parliamentary procedure, as we see it in the Elizabethan Parliament, was clearly an old growth; and we do know enough of the procedure of the mediæval Parliament to see

[54] 49 Ass. pl. 8, "Le Roy ne purra my grant cel per sa chartre sans Parliament, ne faire tenements devisable per sa chartre ou ils ne furent pas devisable devant."

[55] Holdsworth, *op. cit.* i 171, 176.

[56] Porritt, The Unreformed House of Commons 512, 513; but they were sometimes unpopular; in 1330 there was an ineffectual attempt to exclude them from the county representation; and in 46 Edward III an ordinance or statute was passed excluding them, see as to the position of this document the Record Comm. Ed. of the Statutes i 394 n; the attempt to exclude them failed, for, as Mr. Porritt says, "testimony to the presence of lawyers in the House is abundant as soon as the entries in the Journals begin to be full and detailed."

[57] Redlich, *op cit.* ii 53; *infra* note 104.

[58] Holdsworth, *op. cit.* iii 469-472.

[59] *Ibid.* ii 501, 502.

that many of the Elizabethan rules are older than the sixteenth century.[60] A few of these rules will show us what a large debt the English Parliament owed in its earliest years to its close alliance with the law and the lawyers, and more especially to the common law and the common lawyers.

(1) From the earliest period in its history the English Parliament has accepted the principle that the wishes of the majority are decisive.[61] It is probable that the principle itself was derived from the canon law. In this, as in many other instances, ideas drawn from the canon law had a large influence upon the minds of those who were creating a common law in the thirteenth century.[62] It is clear from the Year Books that in the fifteenth century it is accepted as an ordinary and obvious principle.[63] (2) We have seen that the procedure by bill applied to legislation and taxation had much to do with the consolidation of the power of Parliament.[64] It is well to remember that a procedure by bill, setting out the relief sought, was the ordinary procedure of those who asked some favor or some relief from the Council or the Chancery;[65] and a suit to Parliament for a private act, doubtless by bill, was the proper remedy when no relief could be had either at common law or in the Chancery.[66] (3) The committee system which we see in full working order in the Elizabethan Parliaments probably had its roots in the Middle Ages.[67] The Receivers and Triers of petitions are in principle committees appointed to deal with what was then the chief business of the Parliament.[68] On

[60]See *e. g.*, Y. B. 33 Hy. VI Pasch. pl. 8, for an account of the procedure used in making a statute.

[61]Redlich, *op. cit.* ii 261-264; it may perhaps be noted that there is earlier authority for the principle than the Articuli Baronum of 1215—the earliest authority cited by Redlich; in the Leges Henrici Primi V 6, it is stated that in case of conflict the views of the majority will prevail—"Quodsi in judicio inter partes oriatur dissensio, de quibus certamen emerserit, vincat sententia plurimorum;" it was not till 1367 that it was settled that the verdict of a jury might not be given by a majority. Holdsworth, *op. cit.* i 157 n. 2; Thayer, Evidence 87 n. 4.

[62]Holdsworth, *op. cit.* ii 160, 161, 213-215.

[63]Y. B. B. 19 Hy. VI Pasch. pl. 1 p. 63; 15 Ed. IV Mich. pl. 2 p. 2, "Sir, en le Parliament si le greindre partie des Chivaliers des Countys assentent al feasans d'un acte du Parliament, et le meindre partie ne voillent my agreer a cel act, uncore ce sera bon statute a durer en perpetuity," *per* Littleton.

[64]*Supra* 13; *infra* 26-28.

[65]Holdsworth, *op. cit.* ii 365 n. 9.

[66]Brooke, Ab. *Conscience* pl. 15—Y. B. 8 Ed. IV Trin. pl. 1; *supra* note 53.

[67]Redlich, *op. cit.* ii 203.

[68]For a note of their early history see McIlwain, The High Court of Parliament 251-256.

several occasions the House of Commons appointed Treasurers to receive the subsidy and committees to draw up statutes or to examine accounts;[69] and the idea of a delegation of specific business was familiar to the lawyers. The Chancellor from an early period delegated cases to the masters; and the common lawyers from the earliest period were bound to delegate the decision of all questions of fact to a jury. (4) Mr. Redlich has pointed out that all Parliamentary deliberation is cast into the form of a debate upon some specific motion. "It is not a series of independent orations but is composed of speeches and replies."[70] But it was a debate as to the issues to be enrolled composed of speeches and replies, which formed, as the Year Books show us, the chief part of the lawyers' work in court;[71] and it is not at all unlikely that it was their influence which thus created one of the leading characteristics of Parliamentary deliberation. And it is quite clear that some of the rules of debate—*e. g.,* the rules as to the citation of documents in the House, are founded on the lawyers' rules as to evidence.[72] (5) When we first get a clear account of Parliamentary procedure we are struck by the minute attention paid to matters of form. The absence of the proper form of endorsement on a bill sent to the Lords,[73] the absence of a single letter in a precept addressed by the sheriff to his bailiffs,[74] the use by the Lords of paper instead of parchment for their amendments[75] were serious matters to be gravely discussed. When we remember the character of the common law procedure of the fifteenth century,[76] we cannot help suspecting the influence of the lawyers. (6) Coke says:[77]

[69]In 1340 a joint committee of Lords and Commons was appointed to draw up statutes; in 1406 it was requested that certain of the Commons should be present at the engrossing of statutes; in 1341 a committee was appointed to investigate the accounts of the last subsidy, Redlich, *op. cit.* ii 203.

[70]Redlich, *op. cit.* iii 51.

[71]Holdsworth, *op. cit.* iii 479.

[72]Redlich, *op. cit.* iii 60; *ibid.* at p. 82 the learned author says that probably the rules of debate and the order of procedure are "real statements of old established usage."

[73]D'Ewes, Journal 303.

[74]*Ibid.* 556.

[75]*Ibid.* 575-577.

[76]Holdsworth, *op. cit.* iii 471 n. 1.

[77]Fourth Institute 14; cp. Y. B. 7 Hy. VII Trin. pl. 1 p. 16, "Chescun court sera pris solonque ce que ad este use—et issint de l'Eschiquier et Banc le Roy, et Chancery, et issint del Court de Parlement."

"As every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the High Court of Parliament hath also its own peculiar law called the *lex et consuetudo Parliamenti.*"

This law is, like the common law, to be ascertained from the precedents to be found in the Parliamentary records;[78] and, in the House of Commons, the relation of the Speaker to this customary law is strikingly similar to the relation of a judge to the common law and to the rules of his court.[79] Thus the whole idea of Parliamentary Privilege, which developed with the consolidation of the powers of Parliament, springs from the notion that it is a court which like other courts must have its peculiar and appropriate privileges; and to the end many of these privileges—notably the power to imprison for contempt—retain a strong analogy to the privileges of other courts.[80] (7) Like the other courts of law in the Middle Ages, Parliament had its separate rolls, which were conclusive evidence of its proceedings.[81]

Because, from the first, Parliament had been regarded as possessing the status of a superior court, its powers were never fettered by those archaic rules which had so seriously hampered the usefulness of the representative assemblies of the continent.[82] Archaic rules had been already banished from the superior courts by the lawyers of Bracton's school, before Parliament made its

[78]Redlich, *op. cit.* ii 4, 5.

[79]*Ibid.* ii 144, 145, "This duty of the Speaker's [the duty of interpreting the law and custom of Parliament] * * * may best be understood by comparing it with the corresponding attitude of an English judge to the law which he administers. The immense and many meshed net of the common law with its thousands of decided cases wraps him in its folds, but gives him in compensation thousands of chances to use the unwritten law stored up in precedents for extending the law itself by exposition, even for creating new law: so, too, is it with the Speaker. Behind the comparatively meagre body of positive enacted rules stretches the wide expanse of century long parliamentary usage, as recorded in the journals of the House. Here, too, the Speaker has the opportunity of drawing new judge made law out of the old decisions."

[80]It was said in 1593 (D'Ewes, Journal 514) that, "This court for its dignity and higness hath privilege, as all other courts have; and as it is above all other courts, so it hath privilege above all other courts; and as it hath privilege and jurisdiction too, so hath it also coercion and compulsion;" as Mr. McIlwain says, High Court of Parliament 232, 233, this doctrine was extended with the extension of the powers of Parliament, so that the relations of privileges to the law long remained obscure, *ibid.* 237 *seqq.*

[81]Y.B. 33 Hy. VI Pasch, pl. 8 p. 18, "Le court de Parlement est le plus haut court le Roy ad, et si bien seroit que chescun maner chose on Act que est material et fait illonques, la reason seroit estre enrole."

[82]*Supra* 6, 7.

appearance as a settled body.[83] Because it was regarded as the highest court known to the law, the lawyers never took a narrow or a technical view of its powers and privileges. The judges in the fifteenth century declined to give an opinion as to their extent.[84] Thus as its powers expanded it was able to develop on its own lines. It was helped by the technical learning of the lawyers, and was not hindered by the narrow unreasonableness of many of their technical rules. Consequently it acquired ample privileges and a flexible code of procedure which made it an organ of the state as definite as the Council, or as any of the courts of common law, but with a perfectly distinct character of its own.[85] Its acts and proceedings were duly recorded like those of the other courts; and this gave them a permanence and an authority which enabled the power which it had acquired in the Middle Ages to be used as precedents in a later age.[86]

[83]Holdsworth, *op. cit.* ii 164.

[84]*Ibid.* 368, n. 3, 472.

[85]There is an instructive argument in Y.B. 19 Hy. VI Pasch. pl. 1. p. 64 which illustrates at once the lawyers rooted habit of regarding Parliament as a court, and the fact that even the lawyers were beginning to see that it was something very different from an ordinary court; counsel argued that a tax granted by Parliament was a profit of the court of Parliament and "le Roy peut granter les profits de sa Court de Parlement come il peut de ses auters Courts devant que le chose grant soit in luy," but *Newton* pointed out that grants of taxes by Parliament were wholly different things; for the profits of other courts, "sont chose a luy accrues per cause d'un forfait fait a sa Ley * * * mes c'est XV est un grant de voluntate populi sui spontanea, qui preuve que il n'est droit en luy devant le grant par inheritance que il ad en ses Courts;" no doubt there is a tendency to talk of statutes as judgments of the Parliament see *e. g.* Y. B. 7 Hy. VII Trin. pl. 1 p. 15, "un Act de Parlement n'est forsque judicum," *per* Fineux; but as early as Henry IV's reign the two things were seen to differ, see *e. g.*, Y. B. 8 Hy. IV Mich. pl. 13 p. 13, "Quant a ceo que vous dits que l'ordinance fuit un jugement en le Parlement il n'est my issint," *per* Gascoigne, Y. B. 4 Hy. VII Trin. pl. 6. Townshend and Brian agree that there is a difference between the repeal of an act of attainder by another act, and the reversal of an erroneous judgment.

[86]We agree with Mr. McIlwain, High Court of Parliament 230 n. 1, that Professor Redlich is wrong when he maintains (Procedure of the House of Commons i 24, 25) that the conception of the House of Commons as a court has had no influence on its procedure and order of business but that that procedure and order of business "have from the first grown out of the political exigencies of a supreme representative assembly with legislative and administrative functions;" we think that the fact that the lawyers were able to regard it as a court made them ready to assist in its development; and they naturally adopted judicial analogies. On the other hand we think that Mr. McIlwain presses the analogy with a court too far. The lawyers might talk of it as a court; but as the reference to the Y.B.B. in the last note shows, they were quite alive to its essential differences from any other court. Mr. McIlwain considers (*op. cit.* 110) that Parliament was "thought of first as a court rather than as a legislature at least as late as the assembling of the Long Parliament." We shall give some reasons for disagreeing with this view, see *infra* 25, 26.

From this alliance between Parliament and the lawyers there flowed two important consequences.

The first, and, from the point of view of legal history, the most important consequence, was the fact that it helped to give a far more definite meaning, and a far larger practical effect to the theories which English lawyers, like some of their continental brethren, held as to the supremacy of the law over all members of the state, king and subject alike. In England the theory that the law was thus supreme was something very much more than a doctrine of the lawyers. It was a large premise which was used to justify logically the control over taxation and legislation which Parliament had acquired. England, Fortescue explains, is a *dominium politicum et regale,* a kingdom in which the law is supreme, because the king can neither change the laws nor impose taxes without the consent of Parliament.[87] Thus practically illustrated, that which in other countries remained an abstract legal doctrine, became the chief article in the political faith of the English people.[88] Moreover, this doctrine of the supremacy of the law became a far more practically workable principle by reason of its connection with Parliament. Abroad, as we have seen, the doctrine seemed to take the form of the supremacy of a fundamental law which no power in the state could change, and only the lawyers could interpret.[89] In England, at the close of the Middle Ages it was coming to mean the supremacy of a law which Parliament could change and modify.[90] No doubt a belief in the

[87]De Laudibus c. 18 "they proceed not from the Prince's pleasure as do the laws of those kingdoms that are ruled only by regal government * * * for so much as they are made not only by the Prince's pleasure, but also by the consent of the whole realm * * * and if it fortune those statutes, being devised with such great solemnity and witte, not to fall out so effectually, as the intent of the makers did wish, they may be quickly reformed, but not without the consent of the commons, and states of the realme, by whose authority they were first devised;" cp. The Governance of England c. 3, where the miserable condition of the French peasant is ascribed to the fact that the King can impose taxes without the consent of his estates.

[88]It was said in argument in Y. B. 19 Hy. VI Pasch pl. 1 p. 63 "Le Roy peut disinheriter un home et luy mettre a mort que est encontre la Ley, si le Parlement ne fuist" *per* Newton.

[89]*Supra* 11.

[90]Holdsworth, *op. cit.* ii 368-370. We still hold this view in spite of Mr. McIlwain's criticisms of it, *op. cit.* 271-281; his instances are taken from cases which turn on the pre-Reformation view of the relationship between Church and State. These cases we regard as a special, and a very intelligible exception to the ordinary rule. Similarly, we think that he has exaggerated the importance in England of the conception of a fundamental law which even Parliament cannot change (*op. cit.* Chap. II). It is as well to remember that Magna Carta itself, though in form declara-

existence of a fundamental law which no power in the state could change was a reasonable belief when church and state stood over against one another as rival powers, each claiming a large and undefined allegiance from the same persons.[91] It was occasionally recognized by the pre-Reformation lawyers;[92] and it was used as a weapon of political controversy by their successors.[93] But it has never in England possessed much practical importance, because, fortunately for the English constitution, the cause of constitutional liberty has never been obliged to place much dependence upon it. The supremacy of a law which could be changed only by Parliament was, as we shall see,[94] far stronger, a far more manageable, a far more efficient protector of that liberty.

In the second place, the existence of this petitioning, taxing, and legislating body helped to introduce the distinction between a judicial court exercising judicial functions, and a legislative body exercising legislative functions. It was an altogether new species of court which was making its appearance in the English state; and it naturally affected very materially the sphere of the activity of the older judicial courts. It is useful to remember that it was

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tory, was after all enacted law. When the King and Parliament talked of fundamental laws in the seventeenth century (see McIlwain *op. cit.* 75-93) they were thinking of the rights which in their opinion the existing law gave to them. These rights they deemed to be fundamental in the sense that they were the basis of the constitution as they conceived it, not in the sense that King, Lords and Commons could not change them, see *infra* 29. It is only very exceptionally (*e. g.*, in King *v.* Hampden (1637) 3 S. T. at p. 1235, and in Godden *v.* Hales (1685) 11 S. T. 1165 that we meet with the idea of a law which Parliament cannot change, and then only in the arguments of the extreme prerogative lawyers. Even they avoid using it if they have any more solid reasons to advance.

[91]Holdsworth, *op. cit.* ii 366, 367.

[92]See *e. g.*, Y. B. 21 Hy. VII Hil pl. 1, pp. 1-5, cited McIlwain, *op. cit.* 277, 278; we may note that Vavisour (pp. 3, 4) argued that the King could be made a parson by act of Parliament—various lords, he said, had parsonages, "issint n'est impertinent que la Roy sera dit parson: et especial per le Act del Parlement. Car en temps le Roy R. 2 il fuit division pur le Pape en temps de vacation, si come il fuit or tard, et pur ceo que il fuit certifie au Roy et son Conseil, que certein Prestres in Anglia avoient offendus in divers points ils furent per Act de Parlement deprives de lour benefices;" to this Frowicke, C. J. replied that if lords had parsonages this was by the consent of the Pope, and that, "Un acte temporal sans le assent del Supreme teste ne poit faire le Roy parson;" the argument based on the anti-ecclesiastical legislation of Richard II's reign is interesting, as it foreshadows Henry VIII's own argument in the preamble to the Statute of Appeals, Holdsworth, *op. cit.* i 360, 361; similarly Brian's statement, Y. B. 10 Hy. VII Hil. pl. 17, that "Rex est persona mixta car est persona unita cum sacerdotibus Saint eglise," foreshadows the claim to be supreme head of the church holding directly under God.

[93]McIlwain, *op. cit.* 75-93; *infra.*

[94]*Infra* 29, 30.

the rise of Parliament which tended to make the judicial functions of the itinerant justices their most important functions,[95] and to confine the sphere of activity of the juries, summoned to assist the work of the central courts, mainly to judicial work.[96]

The use which the Tudor kings made of Parliament during the sixteenth century consolidated the powers which it had won in the Middle Ages. At the end of this century it stands out as the supreme legislative and taxing authority in the nation, possessed of an adequate procedure, and protected by well recognized privileges. No doubt Parliament was strictly controlled by the crown. No doubt the initiative on all important matters was retained by the crown—though retained at the close of Elizabeth's reign with increasing difficulty. But the picture which D'Ewes draws for us of the Elizabethan Parliaments makes it quite clear that it was this control that was largely responsible for making Parliament, and more especially the House of Commons, an efficient organ of government in a modern state. That control did for Parliamentary power and privilege and procedure what it did for the development of local government under the Justices of the Peace. In both cases the Tudor kings adapted institutions which had begun to develop at the latter part of the mediæval period to the needs of the modern state, by enforcing and increasing their powers, and by diligently supervising the exercise of those powers. Just as the Justices of the Peace were educated by the various forms of control which the crown and the Council applied to them, so Parliament was educated by the use which the crown made of it, by its constant supervision, by the presence of Privy Councillors in the House of Commons, and by their constant service on its committees.[97] In fact, the increase in the powers and the efficiency of the Justices of the Peace and the increase in the efficiency of the House of Commons helped forward the development of both these instruments of government. (1) The growth of the powers and the efficiency of the Justices of the Peace directly increased the efficiency of the House of Commons, because many of its members were Justices. They were able as members of Parliament to make suggestions for the amendment of the law which their experience as Justices had suggested. This

[95] Holdsworth, *op. cit.* i 146.

[96] *Ibid.* 115, 116; the administrative functions of the jury in connection with local government had a much longer life.

[97] We often find all the Privy Councillors in the House put upon committees, *e.g.*, D'Ewes, Journal 157, 345.

acquaintance with practical affairs possessed by many of its members gave a business-like and a practical tone to deliberations in Parliament to which the deliberations of the continental assemblies never attained.[98] These deliberations were therefore a real assistance to the Council in gauging the feelings of the nation,[99] and in the task of devising the measures which were needed both to guard the state against its numerous enemies, domestic and foreign, and to adapt its institutions and its laws to the needs of this new age. (2) Conversely, the growth of the power of the House of Commons increased both the efficiency and the independence of the Justices of the Peace. As members of Parliament they had helped to make some of the laws which they administered, and they were therefore in a position to understand them and apply them intelligently.[100] They could the more easily realize that they were no mere officials of the central government, but independent administrators whose powers had been conferred upon them by the law. For both these reasons they were able to bring to the execution of their various duties those qualities of common sense and individual initiative which are apt to wither under a bureaucratic *régime*.

The result upon Parliament is best described in the well known words of Sir Thomas Smith:[101]

"The most high and absolute power of the realme of Englande, consisteth in the Parliament. For as in warre where the king himselfe in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are, is the force and power of Englande: so in peace and consultation where the Prince is to give life, and the last and highest commaundement, the Baronie for the nobilitie and higher, the knightes, esquiers, gentlemen and commons for the lower part of the common wealth, the bishoppes for the clergie bee present to advertise, consult and shew what is good and necessarie for the common wealth, and to consult together, and upon mature delibera-

[98]See *e. g.*, D'Ewes, *op. cit.* 660, 661, 663, 664—a debate on a bill which involved the increase of the penal jurisdiction of the Justices of the Peace; *ibid.* 505-507,—a debate on bill against aliens; *ibid.* 168-171—a debate on a bill against non-resident burgesses; *ibid.* 86—long arguments on a bill for the increase of the navy.

[99]Thus the Council were well aware from the communications they had received from the Justices that the agitation against monopolies expressed the real feelings of the country, see Hamilton Quarter Sessions from Elizabeth to Anne 23-27.

[100]Thus the Queen addressing the House on its prorogation in 1593 said, "You that be judges and justices of the peace, I command and straitly charge you, that you see the law to be duly executed, and that you make them [*i. e.*, the statutes just passed] living laws when we have put life into them," D'Ewes, Journal 467.

[101]De Republica Anglorum Bk. II c. 1.

tion everie bill or lawe being thrise reade and disputed uppon in either house, the other two partes first each a part, and after the Prince himselfe in presence of both the parties doeth consent unto and alloweth. That is the Princes and whole realmes deede: whereupon justlie no man can complaine, but must accommodate himselfe to finde it good and obey it. * * * That which is doone by this consent is called firme, stable, and *sanctum,* and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe, giveth orders for thinges past, and for thinges hereafter to be followed, changeth rightes, and possessions of private men, legittimateth bastards, establisheth formes of religion, altereth weightes and measures, giveth formes of succession to the crowne, defineth of doubtfull rightes, whereof is no lawe alreadie made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in bloud and name as the highest court, condemneth or absolveth them whom the Prince will put to that triall: And to be short, all that ever the people of Rome might do either in *Centuriatis comitijs* or *tributis,* the same may be doone by the parliament of Englande, which representeth and hath the power of the whole realme both the head and the bodie. For everie Englishman is entended to bee there present, either in person or by procuration and attornies, of what preheminence, state dignitie, or qualitie soever he be, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent."

Smith and all other writers[102] of this century speak of Parliament as a court—"the highest and most authentical court of England"—but still a court. This is a significant, but a very intelligible fact. A large part of the government of the country, central and local, was carried on by courts acting under judicial forms. That all governing bodies partook of the nature of courts was therefore an idea which came naturally to those who treated of public law. Moreover, most of the books which treated of the Parliament were written by men who had been trained in the common law;[103] and

[102] *E. g.,* Lambard, Crompton and Coke.

[103] The chief exception is Smith, who was a Roman lawyer, and a statesman rather than a lawyer; but his book on the Republic of England was meant to be a popular sketch, and he naturally adopts the received terminology. We cannot however agree with Mr. Alston that Smith devotes a large space to the Prince and Parliament only because he regarded the English constitution as consisting primarily of judicial courts; and that he describes them as he does only because "no account of the judicial system would be complete without them," Introd. xxvii. Smith meant, as his letter to Haddon shows, (Alston Introd. xiv), to raise the question, "whether what is held in England as law be the better, or what is held here (in France) and in those regions which are administered in accordance with Roman law." By "law" Smith clearly meant public rather than private law. But the position of the English Parliament in its relation to the Prince afforded, as we have seen, one of the greatest of contrasts to foreign states. We think that it was mainly for this reason that he describes it so fully.

all of them were familiar with the ideas of the common law. Thus it is not surprising that all writers (whether common lawyers or not) should talk of Parliament as a court. The lawyers found it so treated of in the Year Books; and all could see that its judicial functions and attributes were, and indeed still are, well marked.[104] In fact, for some time after the term "court" had come to signify simply a judicial tribunal, lawyers will occasionally speak of an act of Parliament as a "judgment of the Parliament;"[105] and for a yet longer time lawyers and statesmen and ecclesiastics will speak of "the High Court of Parliament." They will thus continue to speak of Parliament as a court, partly because ideas derived from the period when it was one among many mediæval courts have had a permanent influence upon its powers, its privileges, and its procedure; partly because, in the sixteenth century, the lawyers were a very important class among its members;[105a] and partly because in the seventeenth century—the century in which the powers and privileges and procedure of Parliament gained their permanent shape—the lawyers, to whom the conception of a court came naturally, were the leaders and champions of the Parliamentary cause.

But we think that too much stress should not be laid upon the fact that Parliament thus continued to be spoken of as a court. We have seen[106] that even in Henry VI's reign the lawyers were beginning to discover that conceptions borrowed from the law as to the jurisdiction of courts could not easily be applied to those powers

[104]For the various kinds of jurisdiction exercised by the House of Lords see Holdsworth, *op. cit.* i 179-193. It should be noted that till quite the end of Elizabeth's reign the judges served on some committees of the House of Lords, not as attendants upon the committee but as members of it, D'Ewes, Journal 22, 67, 99, 101, 108, 142; in 1585 they are named as attendants only, *ibid.* 319, and on another occasion as members, *ibid.* 322; in 1589 they are also named as members, *ibid.* 422, but after 1597 as attendants only, *ibid.* 527; when dealing with private bills (the procedure upon which is still quasi-judicial) the House of Commons is often styled a Court, *e. g., ibid.* 587; and also when dealing with certain cases of privilege, *ibid.* 514, 515.

[105]Thus in Chudleigh's Case (1589-95) 1 Co. at p. 132, L. Walmesley, J. and Periam, C. B. said that the Statute of Uses was a, "judgment given by the whole Parliament;" cp. Brooke, Ab. *Parlement* pl. 73 (39 Hy. VIII); Bacon's argument in Calvin's Case, Co. Works (ed. Spedding) VII 671, speaks of two statutes as, "judgments in Parliament by way of declaration of law."

[105a]In 1545 Wriothesley, writing to Paget and Petre as to a proposal to hold the Parliament at Reading, said that, if it were held there, it would be best to adjourn the law term, as, without the judges, sergeants, and other persons engaged at the Courts, "you shall have a very simple assembly," Letters and Papers xx Pt. ii No. 302.

[106]*Supra* note 85.

of taxation and legislation which were fast coming to be the most important functions of a Parliament. As in the case of local government in this century, so in the case of Parliament, non-judicial functions were being rapidly developed. At the end of the century the growth of these functions had made it obvious that Parliament was comparable quite as much to the Council as to a court.[107] "This court," said Coke, when addressing the House of Commons as Speaker in 1592-3, "is not a Court alone."[108] It had indeed become very different from any other court, for in it were represented the king and the three estates of the realm—"The great corporation or body politic of the kingdom."[109] It was this fact which gave to it its "high, absolute, and authentical powers;" and it was these powers which were destined to so expand in the following century that the sovereignty of Parliament has become the central and characteristic feature of English constitutional law. As with the Justices of the Peace in the sphere of local government, so with Parliament in the sphere of central government a mediæval institution had been so adapted that it was able to satisfy the requirements of the modern state, and develop with its development.

That Parliament, without ceasing to possess some of the characteristics of a court,[110] could be so used by the Tudor sovereigns that it became a true legislative assembly, is due largely to the manner in which the lawyers had guided its development in the fourteenth and fifteenth centuries, and especially to the substitution of the practice of legislating by bill for the practice of legislating by petition.[111] So long as legislation took the form of a petition to the king, those petitions which resulted in legislation did not differ materially from petitions which resulted in a judicial decree;[112] and, as we have said, a petition to Parliament for a

[107]It was so spoken of by Peter Wentworth, D'Ewes, Journal 411, *infra* note 122.

[108]D'Ewes, Journal 515, "Though any court of record hath this jurisdiction to make out processes, yet this court cannot. Why? This may seem strange that every court in Westminster, every court that hath causes of Plea, every lords leet, and every court baron hath his powers that they may make out process; yet this court being the highest of all courts cannot; how can this be? The nature of this House must be considered; for this court is not a court alone; and yet there are some things wherein this court is a court by itself, and other things wherein it is no court of itself;" cp. *ibid.* 434, where the Speaker describes it as "The highest court of all other courts and the great council also of this realm."

[109]Coke, Fourth Instit. 2.

[110]*Supra* 24 *seqq.*

[111]*Supra* 13.

[112]*Supra* 16.

private Act still retains the judicial characteristics which marked the early stages in the history of every variety of Parliamentary legislation. But there could be no talk of petition in connection with the many important bills which during this period originated with the crown; and, as they required the consent of both Houses, their passage emphasized the fact that Parliament was a partner in the work of legislation. Bills, whether originating from the crown or not, to which the king and the two Houses had assented, resulted in an Act of the Parliament; and it gradually became clear that even the bills of private persons which asked for something in the nature of a judicial decree fell, if enacted by the same authority, into the same category.[113] But since their judicial character was more strongly marked, it was with more difficulty that their position as legislative acts was realized. The methods adopted to sift the sufficiency of the reasons alleged by these petitioners for private Acts were judicial in their nature.[114] The passage of the ordinary private bill partook somewhat of the character of a civil action; and the passage of an act of attainder partook somewhat of the character of a criminal trial. Until Henry VIII's reign it was not clear that the law would admit the validity of an act of attainder passed without hearing the accused in his defense. But in Henry VIII's reign it was realized that Acts of the Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these acts, however morally unjust, must be obeyed.[115] The legislation which

[113]Y. B. 4 Hy. VII Mich pl. 11, "En le Parlement le Roy voulait que un tiel soit attaint, et perdrait ses terres, et les Seigneurs assentirent, et rien fuit plede des Commons purquoi touts les Justices tenirent clerement, que ce ne fuit Acte, perquoi il fuit restore."

[114]"Thus it was the practice to hear counsel at the Bar of the House on such bills, see D'Ewes, Journal 50, 68, 86, 317; at p. 124 (1566) there is the following entry:—"This morning the Dean of Westminster was present at the Bar with his counsel; *viz.,* Mr. Edmund Plowden of the Middle Temple, and Mr. Ford a civilian. The Dean himself made an oration in defense of the Sanctuary, and alleged divers grants by King Lucius and other Christian Kings, and Mr. Plowden alleged the grant of Sanctuary there by King Edward five hundred years ago: *viz., Dat.* in *an* 1066 with great reason in law and chronicle; and Mr. Ford alleged divers stories and laws for the same; and thereupon the bill was committed to the Master of the Rolls, and others [not named] to peruse the grants, and to certify the force of the law now for Sanctuaries."

[115]Co. Fourth Instit. 37, 38, "I had it of Sir Thomas Gawdye knight, a grave and reverend judge of the King's Bench, who lived at that time, that King H. 8. commanded him to attend the chief Justices and to know whether a man that was forthcoming might be attainted of High Treason by Parliament, and never called to his answer. The Judges answered that it was a dangerous question, and that the High Court of Parliament

had deposed the Pope and made the church an integral part of the state had made it clear that the morality of the provisions of a law, or the reasons which induced the legislature to pass it could not be regarded by the courts. *"Nil ineptius lege cum prologo,"* said Bacon in his argument in Chudleigh's case, *"jubeat non disputet* * * * for the law carries authority in itself."[116]

But when an Act of Parliament had acquired this authority, the last remnants of the idea that there might be fundamental laws, which could not be changed by any person or body of persons in the state, necessarily disappeared. It was obviously difficult to assign any limits to the power of the Acts of a body which had effected changes so sweeping as those effected by the Reformation Parliament. We do not forget that Coke sometimes writes as if he believed in the supremacy of a law which even Parliament could not change.[117] But it would, we think, be a mistake to lay too much stress on isolated statements of this kind.[118]

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ought to give examples to inferior Courts for proceeding according to Justice. But being by the express commandment of the King, and pressed by the said Earl [Cromwell] to give a direct answer: they said that if he be attainted by Parliament, it could not come in question afterwards, whether he was called or not to answer * * * *Facta tenent multa, quæ ñcri prohibentur;* the Act of Attainder being passed by Parliament—did bind as they resolved."

[116]Argument in Chudleigh's Case, Co. Works (ed. Spedding) VII at p. 625, he is talking of the preamble to the Statute of Uses; the passage runs as follows:—"And whereas a wise man has said, *nil ineptius lege cum prologo, jubeat non disputet;* this had been true if preambles are annexed for exposition; and this gives aim to the body of the statute; for the preamble sets up the mark, and the body of the law levels at it."

[117]See especially Bonham's Case (1609) 8 Co. Rep. 107, 118—"In many cases the law will control acts of Parliament and sometimes adjudge them to be utterly void" cp. Maitland, Constitutional History 300, 301; similarly in Calvin's Case (1609) 7 Co. at pp. 13a and 25a there is some loose talk of impossibility of altering even by Parliament a provision of natural law.

[118]We think that Mr. McIlwain, The High Court of Parliament 286 *seqq.* exaggerates their importance, and we still hold the views expressed in Holdsworth, *op. cit.* ii 369, 370; Bacon clearly did not hold this view, *supra* n. 116; in other passages in his argument in Chudleigh's Case the same view is repeated—thus at p. 623 he says that the judges' authority over laws is "to expound them faithfully and apply them properly;" at p. 633, to the argument that the limitations in that case should be allowed because they would be a refuge in time of trouble to great houses, he says, "If force prevail above lawful regiment, how easy will it be to procure an act of Parliament to pass according to the humour and bent of the state to sweep away all their perpetuities:" it is true that in the Discourse on the Commission of Bridewell, Works VII 509-516, he talks (at p. 513) as if he thought that an Act of Parliament which contravened Magna Carta would be void; but such a view is wholly opposed to the latter part of the Discourse, when he expressly allows that departures from the clause of Magna Carta, which he is considering, are valid, because they are made by Parliament.

In the first place Coke was often inconsistent because he had the mind of an advocate, and therefore often allowed himself to be carried away by the argument which he is urging at the moment. In the second place he was so thoroughly steeped in mediæval law that he sometimes reproduces ideas which he himself would have admitted to be archaic.[119] In the third place, he is often writing and thinking of the supremacy of the existing law, and not of the question whether Parliament was competent to change it. When Parliament is not sitting it is the existing law, as interpreted by the judges, which is supreme; and when, as in the seventeenth century, the different component parts of the Parliament cannot act together, the same result ensues. In the Fourth Institute, when he is dealing specifically with the powers of Parliament, and in other passages, he admits its supremacy freely and fully.[120]

In the sixteenth century, therefore (whatever may be true of earlier periods), it is clear that the supremacy of the law, taught by Bracton and the Year Books, has come to mean, not the supremacy of an unchangeable law, but the supremacy of a law which Parliament can change.[121] The supremacy of the law is coming to mean the supremacy of Parliament. That the lawyers never placed any difficulty in the way of this evolution was a fact which had large effects upon the future development both of the constitution and of the common law.

Because they did not insist upon the existence of fundamental

[119] *E. g.*, he says, Fourth Instit. 14, that the commons may say that they cannot answer without conference with their constituents; see *supra* n. 16 for the archaic character of this idea.

[120] Fourth Instit. 36, the power of Parliament is, "so transcendent and absolute that it cannot be confined either for causes or persons within any bounds;" *ibid.* 37, talking of an act of attainder, he clearly distinguishes the expediency of a law from the power to make it; *ibid.* 42, 43, "Acts against the power of subsequent Parliaments bind not;" cp. Second Instit. 498, where a record of Edward I's reign is cited to the effect that, "the award of Parliament was the highest law that could be;" Co. Litt. 115b, "the common law hath no controler in any part of it but the high court of Parliament, and if it be not abrogated or altered by Parliament it remains still;" Bl. Comm. i 160, 161; Dicey, Law of the Constitution 46. We use the word "Supremacy" advisedly, as we do not think that Coke had fully grasped the doctrine of sovereignty as taught by Bodin, and after his day, by Hobbes—as to this see Alston's Ed. of Smith's Republic xxxiii and cp. Figgis, Camb. Mod. Hist. iii 748; Gooch, English Democratic Ideas in the Seventeenth Century 37.

[121] D'Ewes, Journal 164, "Mr. Morrison said, it were horrible to say, that the Parliament hath not authority to determine of the crown; for then would ensue, not only the annihilation of the statute 35 H. 8, but that the Statute made in the first year of her Majesty's reign of recognition, should also be laid void;" cp. Yelverton's Speech, *ibid.* 175, 176.

laws which could not be changed by the ordinary legislative machinery of the state, they were not thrust into a position of political conflict with the crown. The supremacy of the existing law, so long as Parliament saw fit to leave it unaltered, was guaranteed by the powers of Parliament;[122] and to Parliament they could safely leave any political conflict needed to maintain this position. There was no need therefore for the courts of common law to be anything but useful servants of the crown; and, for this reason, there was not the same temptation that there was abroad to supersede them by the newer courts which depended more directly upon the king's will. Though many new courts arose in this country, the king was content to allow the ordinary courts to continue to exercise their old jurisdiction. They thus continued to be the guardians and the interpreters of the common law; and since the rules of the common law contained the greater part of the public law of the state, the courts retained many of those political functions of which in foreign countries they were deprived by the growth of a system of administrative law.[123]

These political functions exercised by the courts harmonized with the character which the local government of the country had assumed. The officials and communities to which the local government was entrusted originated, as we have seen, at a period when the mediæval view that the law was supreme was unquestioned. Their powers and duties were determined for the most part by statutes, and by old rules of the common law. They could be punished by the common law courts for misfeasances and for

[122]That Parliament identified itself with the cause of the supremacy of the law is clear from D'Ewes—see *e. g., op. cit.* 168—a high prerogative speech by Sir Humphrey Gilbert, "was disliked, as implying many occasions of mischief;" *ibid.* 176, Yelverton said, "The Prince could not of herself make laws, neither might she of the same reason break laws;" *ibid.* 238—Peter Wentworth's speech citing Bracton as to the subjection of the King to the law; *ibid.* 411—Peter Wentworth asked, "whether there be any Council which can make, add to or diminish from the law of the Realm, but only this Council of Parliament."

[123]See Bacon's discourse on the Commission of Bridewell, Co. Works (ed. Spedding) VII 509-516,—many of the old Y. B. B. cases are cited to show that the law is supreme, and that the Judges can hold to be void grants contrary to law; and at p. 514, he cites a case of Elizabeth's reign in which this view was acted upon—"There was a commission granted forth in the beginning of the reign of her Majesty that now is * * * for the examination of felons and other lewd prisoners. It so fell out that many men of good calling were impeached by the accusations of felons. Some great men and judges also entered into the validity of the Commission. It was thought that the Commission was against the law, and therefore did the Commissioners give over the Commission, as all men know."

non-feasances; and, by means of the prerogative writs, they could be ordered to act or to refrain from acting, or their decisions could be questioned. It is clear that authorities of this kind, thus controlled, will not easily become the mere officials of the central authority, nor easily subjected to a system of administrative law.

Thus in England and in England alone the mediæval conception of the supremacy of the law was adapted to the needs of a modern state. That it could be thus adapted is due in part to the retention by the Tudors of the mediæval machinery of local government, but chiefly to the maintenance of the old alliance between Parliament and the common law. Foreign writers, like Hotman[124] or Duplessis-Mornay,[125] who protested against the growth of royal absolutism, argued from the powers which the representative assemblies and courts of law had possessed in the Middle Ages, or adapted to modern needs the mediæval theories designed to uphold the supremacy of law. But on the continent the powers of those assemblies and the theories of the lawyers had never coalesced. It was only in England that the powers of Parliament had come to be regarded as the main security for the supremacy of the law; for it was only in England that the lawyers, by freely admitting the legislative supremacy of Parliament, had gained the support of Parliament and the nation for the mediæval doctrine of the supremacy of the law. It was the continuance of this alliance between Parliament and the lawyers, which in the following century finally secured the triumph of a conception which was destined, in yet later centuries, to have a vast influence upon the political ideas and machinery of the old and new world.

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[124]His book—The Franco-Gallia—Mr. Figgis calls (Camb. Mod. Hist. iii 760) "The earliest of modern constitutional histories."

[125]The Vindicia contra Tyrannos, written either by Duplessis-Mornay or by Lanquet, though some contend for a joint authorship of the two men, see Gooch, *op cit.* 13, 14; for a good account of the book see Figgis, Camb. Mod. Hist. iii 760-764.